



DEPARTMENT OF THE NAVY

COMMANDER
NAVY REGION MID-ATLANTIC
1510 GILBERT ST.
NORFOLK, VA 23511-2737

IN REPLY REFER TO:

5090
EVN40/09/RE309

JUN 19 2013

Newton Tedder
US EPA-Region 1
5 Post Office Square, Suite 100
Mail Code OEP06-4
Boston, MA 02109-3912

Dear Mr. Tedder:

SUBJECT: DEPARTMENT OF DEFENSE (DOD) COMMENTS ON THE PROPOSED
DRAFT NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
(NPDES) GENERAL PERMIT (GP) FOR DISCHARGES FROM SMALL
MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4s) TO
CERTAIN WATERS OF THE STATE OF NEW HAMPSHIRE

As the Department of Defense (DoD) Regional Environmental Coordinator (REC) for U.S. Environmental Protection Agency (EPA) Region 1 and on behalf of the military services, the Commander, Navy Region Mid-Atlantic is responsible for coordinating responses to environmental policies and regulatory matters of interest. We appreciate the opportunity to provide comments for your consideration in response to the Notice of Availability for the subject GP. As discussed below, we have significant concerns with the language in Section 5.2 of the permit requiring that federal agencies comply with the development and redevelopment post construction stormwater control standard in Section 438 of the Energy Independence and Security Act of 2007 (EISA § 438).

DoD is committed to managing stormwater from its facilities' development and redevelopment projects through green technology and low impact development design principles and practices, and has implemented policy to do so. To that end, DoD is already fully implementing the provisions of EISA § 438, consistent with the EPA Technical Guidance, using Low Impact Development techniques in accordance with DoD policy. We share EPA's goal of restoring the quality of New Hampshire waters.

The draft permit includes requirements from EISA § 438 in a Clean Water Act (CWA) NPDES permit. We note EISA and the CWA are two separate statutes having related but distinct underlying purposes and enforcement mechanisms. The CWA is designed to eliminate the discharge of pollutants into navigable waters of the United States and the accompanying sovereign immunity waiver as related to federal facilities provisions apply to the "control and abatement of water pollution". EISA § 438 is designed to maintain or restore to the maximum extent technically feasible the pre-development hydrology of the property with regard to the temperature, rate, volume, and duration of flow. Therefore, EISA § 438 is designed to retain stormwater onsite to allow infiltration into groundwater rather than entry into navigable waters of the United States and goes beyond the waiver provision. We also note Congress did not amend the CWA when it passed EISA, nor the accompanying CWA sovereign immunity waiver provision. Any waiver of sovereign immunity must be unequivocally expressed and cannot be implied. Given that EISA does not have a sovereign immunity waiver, clearly EISA § 438 was written to be self-executing by federal agencies in the management of stormwater from federal development and redevelopment projects.

We do not believe the CWA authorizes the inclusion of EISA § 438 standards in New Hampshire GP-NHR042000. The CWA contains broad enforcement authorities to ensure compliance by the entire regulated community, including federal facilities, in applicable circumstances, but Congress did not extend that authority to the substantive EISA § 438 requirements. Prior to the inclusion of requirements based on EISA § 438 in an MS4 permit, we assume that EPA would complete federal rulemaking under the Administrative Procedures Act to amend its stormwater regulations, providing all stakeholders notice and the opportunity to comment on the standards, their effectiveness, and the economic impact of the imposition of such standards. EPA has only started this process by requesting for input on a rulemaking for newly developed or redeveloped sites through issuance of its Stakeholder Input on Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68617 (December 28, 2009). As you know, DoD submitted comments on that proposal on February 24, 2010, requesting clarification of authorities under section 402(p) of the CWA.

The draft permit proposes to hold federal facilities to a more stringent performance standard than non-federal facilities. The federal government is only subject to requirements under the CWA to the extent it is treated in a non-discriminatory manner. Under CWA § 313(a), federal agencies are subject to "all Federal State, interstate, and local requirements . . . respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." In this case, EPA has proposed two different stormwater performance standards, one for federal entities and one for non-federal entities. The draft permit will place New Hampshire in the position of being unable to comply with the permit as they would be unable to enforce a requirement that discriminates against its federal government dischargers.

DoD is also concerned with the incorporation of portions of EPA's EISA § 438 Technical Guidance as legally binding requirements in a NPDES permit. As required by EO 13514, EPA issued Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under EISA § 438, in December 2009. In issuing the Technical Guidance, EPA explained that the document was intended solely as guidance, and did not impose any legally binding requirements on federal agencies or impose legal obligations upon any member of the public. DOD was surprised to see elements of the Technical Guidance as mandatory elements in an NPDES permit. It is not clear why these performance standards were included in the draft permit, as DOD has already instructed its installations to implement EISA § 438 consistent with EPA's Technical Guidance, pursuant to a policy memorandum in January 2010.

5090
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If you have any questions, my points of contact for this matter are Lieutenant Commander Mark Nevitt, JAGC, U.S. Navy at mark.nevitt@navy.mil or (757)322-2938 or Mr. William Bullard, Senior Water Program Manager, at (757) 341-0429 or william.bullard1@navy.mil.

Sincerely,



CHRISTINE H. PORTER
Director, Regional Environmental
Coordination
By direction of the Commander

Enclosure: Department of Defense Comments

Copy to: (1) Regional Environment & Energy Office - Northern
Coordinator, Office of the Secretary of Army
(2) U.S. Air Force Regional Environmental Office,
Eastern Region